LIM TEONG SIT & ANOR

v.

DATUK BANDAR KUALA LUMPUR & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
WAN AFRAH J
[APPLICATION FOR JUDICIAL REVIEW NO: R2-25-27-2003]
28 SEPTEMBER 2005

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Planning permission - Datuk Bandar approved application to convert residential building to pre-school use after earlier rejecting application a number of times - Whether Datuk Bandar owed duty to aggrieved persons to give reasons for change of decision - Whether aggrieved persons deprived right to be heard - Whether breach of rules of natural justice - Federal Territory (Planning) Act 1982, s. 22(5) - Planning (Development) Rules 1970, r. 14, sub-rr. 5(3)-5(9)*

The 2nd respondent's application to convert a residential building to pre-school use was rejected by the 1st respondent approving authority a number of times before approval was finally given. The 1st respondent had earlier rejected the 2nd respondent's application due to objections raised by the applicants who were residents in the vicinity concerned. The applicants now applied for judicial review to quash the 1st respondent's decision to grant the said approval. The applicants argued that the 1st respondent failed to explain the sudden change of stance from its previous decisions rejecting the 2nd respondent's application and appeals.

Held (dismissing the application):

(1) The duty to give reason under s. 22(5) of the Federal Territory (Planning) Act 1982 ('the Act') is only applicable to an applicant seeking planning permission and that the said reason be transmitted to the objector as a piece of information only. The intention of legislature in imposing such a duty under s. 22(5) is for appeal purposes only. This is to enable the Appeal Board to use the reason given to determine the merits of an appeal by an aggrieved party against the 1st respondent's decision pursuant to s. 23(1) of the Act. As to the general duty to give reasons, since the present case

involved planning judgment made by the 1st respondent, it was not prudent that the 1st respondent give reasons to objectors who were not applicants for the planning permission. (paras 14, 15 & 16)

(2) By virtue of the exception under r. 14 of the Planning (Development) Rules 1970, compliance to sub-rules 5(3) to 5(9) of the same was inapplicable. The right to hear the objection was therefore excluded. Hence, the applicants' allegation that the 1st respondent had acted in breach of the rules of natural justice was of no merit. Besides, the 1st respondent had taken into consideration the previous objections of the applicants and the planning permission granted to the 2nd respondent was with conditions. (paras 20, 21, 22 & 23)

Case(s) referred to:

Datin Azizah Abdul Ghani v. Dewan Bandaraya Kuala Lumpur & Ors And Another Appeal [1992] 1 CLJ 2071 SC ***(refd)***

Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 CA ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1997] 1 CLJ 665 CA ***(refd)***

Lee Freddie & Ors v. Majlis Perbandaran Petaling Jaya & Anor [1994] 3 MLJ 640 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Wong Ah Suan v. Sarawak Electricity Supply Corporation & Anor [1982] CLJ 237; [1982] CLJ (Rep) 50 PC ***(refd)***

Legislation referred to:

Federal Territory (Planning) Act 1982, ss. 22(5), 23(1)

Planning (Development) Rules 1970, rr. 5(3)(b), (9), 14

For the applicants - Jack Yow Pit Pin; M/s Shearn Delamore & Co

For the 1st respondent - Thangaraj Balasundram; M/s Thangaraj & Assoc

For the 2nd respondent - Wong Kian Kheong (Karen Lee Foong Voon with him); M/s Lee Hishammudin Allen & Gledhill

Reported by Usha Thiagarajah

JUDGMENT

Wan Afrah J:

[1] This was an application by the applicants for judicial review to quash the 1st respondent's decision following a letter dated 14 January 2003 that allowed the 2nd respondent to convert the use of a residential building situated at No. 3, Jalan Batai Barat, Bukit Damansara, Mukim Kuala Lumpur into a pre-school.

[2] The applicants are the residents at Jalan Batai Barat, Bukit Damansara, Kuala Lumpur and whereas, the 2nd respondent is an operator of a pre-school operating in the same vicinity neighbouring the applicants. The 1st respondent is the approving authority for any application for land use matter within the Federal Territory.

[3] Following the applicants' affidavit on the facts of the case, it was affirmed that the 2nd respondent had on September 2000 first applied to 1st respondent to convert a residential building to pre-school use. Such application however was rejected on the basis of objections by the applicants and other residents. Thereon, a series of appeals were made by the 2nd respondent which were again rejected by 1st respondent.

[4] On 15 October 2002, the 1st respondent approved and granted a planning permission to the 2nd respondent for the adjoining residential building (No. 3, Jalan Batai Barat, Bukit Damansara, Kuala Lumpur) to be converted into a pre-school in response to the later's application/appeal in September 2002.

[5] Pursuant to the decision made on 15 October 2002, the 1st respondent in a letter dated 14 January 2003 issued a development order approving the 2nd respondent's application. In the same letter, it expressed that such approval is granted with conditions imposed.

[6] In respect of the event that took place and the decision made by the 1st respondent thereon, the applicants contested that the 1st respondent had failed to give adequate reason for such decision in question. The applicants raised a substantial point that the requirement to give reason was necessary and is found in s. 22(5) of the Federal Territory (Planning) Act 1982 ("FTPA 1982").

[7] The applicants submitted that the 1st respondent failed to explain why there was a sudden change of stance from its previous decisions rejecting the 2nd respondent's applications/ appeals. The applicants claimed that it was imperative for the 1st respondent to explain the following:

(i) what were the changes of circumstances from the last rejection on 29 July 2002 to the approval on 14 January 2003?

(ii) what were the findings of its officer who conducted the investigation following the 2nd respondent's appeal?

(iii) what was discussed during the meeting on 15 October 2002 leading to the approval of the planning permission?

(iv) how were the objections of the applicants and the 5 neighbours to the 2nd respondent's applications/appeals dealt with? If, previously, the objections were taken into consideration in rejecting the 2nd respondent's application/ appeals, why were these objections overridden now?

[8] To the aforesaid questions, the applicants reasoned that the 1st respondent's reasons provided in the affidavit were inadequate and that there is no suggestion that it had considered any change of circumstances warranting a reversal to its previous decisions rejecting the 2nd respondent's applications/appeals.

[9] The applicants submitted that failure by the 1st respondent to offer reason was sufficient ground for this court to quash the later's decision. On the premise of this ground, the applicants relied on the following case law;

(i) *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65. In this case the Federal Court had this to say:

> We endorse the principles enunciated by the Privy Council in Dr Stefan and say that in the exceptional circumstances of this case having regard to the trend towards increased openness in matters of Government and administration, as a matter of fairness, reasons should have been given by the Council as to why it was imposing the disputed condition and thus resiling from the original approval of planning permission which was free from pricing condition ... To put it mildly, the circumstances here were such as to cry out

> for an explanation from the Council as to its departure from its earlier stance, yet none was vouchsafed to the Society until after the proceedings had been commenced in Court. That belated explanation, as we have already indicated, left much to be desired.

(ii) *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan* [1997] 1 CLJ 665.

[10] On the other hand, counsel for the 1st respondent submitted that the 1st respondent had acted in accordance with the relevant provisions of the FTP Act and Planning Rules and had given adequate reasons for granting temporary approval for planning permission to the 2nd respondent.

[11] The reasons can be found in the 1st respondent's affidavit particularly in para. 7.10 which states that "there is a demand for kindergarten in the area in respect of the different age group and the 1st respondent's officers had conducted further investigations in respect of the 2nd respondent's application".

[12] In the same matter, counsel for the 1st respondent reiterated that where such reasons were accorded in the affidavit and if found to be inadequate by the applicants, it remains that s. 22(5) of the FTP Act applies to the applicant (ie, 2nd respondent) for a planning permission and not to the objectors (ie, the applicants in the present case).

[13] Section 22(5) of the FTP Act reads as follows:

> Upon the receipt of an application for planning permission the Commissioner shall within such time as may be prescribed either grant or refuse the application and when the application is granted subject to condition or refused, the Commissioner shall give his reasons in writing for his decision.

[14] To me, from the reading of s. 22(5) of the said Act, it is obvious that the duty to give reason is only applicable to the applicant seeking for a planning permission and that such same reason/decision is transmitted to the objector as a piece of information.

[15] I am also of the view that the intention of legislature in imposing a duty to the 1st respondent to give reason for a decision made under s. 22(5) of the FTP Act is that such reason could be used by the appeal board to determine the merits of

appeal by an aggrieved party should he/she appeal against the 1st respondent's decision pursuant to s. 23(1) of the Federal Territory Act.

[16] As to the general duty to give reasons, I am minded of the decision of the case of *Datuk Bandar Kuala Lumpur v. Zain Azahari bin Zainal Abidin* [1997] 2 CLJ 248. Whereupon in the present case, I am of the opinion that it involves planning judgment made by the 1st respondent and therefore it is not prudent that the 1st respondent to give reason to the objectors who are not even the applicant for the planning permission.

[17] Having deliberated on the first ground where I am of the opinion that this ground is devoid of merit, I shall now examine on the next ground of contention.

[18] In the following ground, the applicants claimed that the 1st respondent did not/failed to issue as required to r. 5(3)(b) of the Planning (Development) Rules 1970 – to invite them to a meeting held on 15 October 2002 to challenge the 2nd respondent's application/appeal. In short, the applicants submit that they were denied a chance to be heard and it amounts to a breach of rules of natural justice ie, the fair hearing rule as embodied in the maxim *audi alteram partem*. The applicants expressed that it is trite that adjoining owners who are adversely affected by the decision of local authority has the legitimate expectation to be notified and have their objection heard. The applicants find support by referring to the following cases:

(i) *Datin Azizah bte Abdul Ghani v. Dewan Bandaraya Kuala Lumpur & Ors and Another Appeal* [1992] 1 CLJ 2071.

(ii) *Lee Freddie & Ors v. Majlis Perbandaran Petaling Jaya & Anor* [1994] 3 MLJ 640.

(iii) *Wong Ah Suan v. Sarawak Electricity Supply Corporation & Anor* [1982] CLJ 237; [1982] CLJ (Rep) 50.

[19] On this ground, the 1st respondent argued that the provision of sub rules 5(3) to 5(9) of the Planning Rules are not applicable, pursuant to the Exemption under r. 14 gazetted *via* P.U.(A) 7/71. Such exemption order, however was never challenged by the applicants.

[20] By virtue of the exception under r. 14 which was resorted to by the 1st respondent, it is apparent to me that the compliance to sub rule 5(3) to 5(9) of the Planning Rule now becomes inapplicable. It categorically stated –

> (Exemption Under r. 14 of the Federal Territory (Planning Act 1982)
>
> In exercise of the powers conferred by rule 14 of the Planning (Development) Rules 1970, the Datuk Bandar Kuala Lumpur with the approval of the Minister exempts application for planning permission for the following developments from the operation of the provision of sub rules 5(3), 5(4), 5(5), 5(6), 5(7), 5(8) and 5(9):
>
> (a) ...
>
> (b) buildings for kindergarten and nursery separated by an individual;
>
> (c) temporary change of use of building which does not involve change of land use zoning subject to the following conditions:
>
> (i) ...
>
> (ii) ...
>
> (iii) ...
>
> (d) ...

[21] From the reading of the above, it therefore excluded the right to hear the objection as provided for under sub 5(3) to (9) of the Planning Rule. Henceforth, the allegation by the applicants that the 1st respondent had acted in breach of the rule of natural justice/procedural fairness – again, is of no merit, particularly also, when the applicants did not attempt to challenge on this Exemption under r. 14 as exercised by the 1st respondent. Here (pertaining to the same ground) I am also satisfied that the previous objection by the applicants were taken into consideration by the 1st respondent and so reflected in the affidavit and the development order issued.

A **[22]** As to the other issue of *functus officio* raised by the applicants, it is not relevant to me to dwell into.

[23] In conclusion, it is to my considered opinion that there is no substantial injustice or inconvenience caused to the applicants. Moreover, the planning permission granted to the 2nd respondent in this case, were with conditions. Henceforth, I find no reason to issue a *certiorari* and that the application is hereby dismissed with costs.

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